Ling Ngong Tick (Johnny) v Industrial Court of Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–04 OF 2001
RAUS SHARIF J
14 APRIL 2005

Labour Law — Industrial Court — Award — Application to quash award — Whether Industrial Court was right in finding that applicant had voluntarily left employment — Whether Industrial Court was correct in its use of 'constructive dismissal' in award — Burden of proof of allegation of dismissal without just cause or excuse

The applicant was employed by Berjaya Georgetown Hotel (Penang) Sdn Bhd as a Purchasing Manager. The letter of appointment set out the terms and conditions of his employment which include provisions relating to transfer. The applicant was later transferred to the second respondent as an assistant purchasing manager. This was an application by the applicant for an order of certiorari to quash the Industrial Court award. In the said award, the Industrial Court dismissed the applicant's claim that he had been dismissed without just cause or excuse. The Industrial Court found that the applicant had voluntarily left the service of the second respondent.

Held, dismissing the application for judicial review:

(1) The Industrial Court was correct in assigning the burden of proof in the manner with which it had done, ie on the applicant. This position was consistent with the case of *Weltex Knitwear Industries Sdn Bhd v Lau Kar Toy & Anor* [1998] 7 MLJ 359 (see para 16). The fact of dismissal was in dispute and when the fact of dismissal is in dispute, the applicant bears the burden of proving that there was in fact such a dismissal. If he cannot do so then his case fails. The Industrial Court found that the applicant had not discharged the burden of proof (see para 17).

(2) The Industrial Court was correct in its use of the phrase 'constructive dismissal' in the said award. In the circumstance of this case, the Industrial Court had a factual basis or reason which warranted the use of the phrase. The facts and argument presented were consistent to an allegation of 'constructive dismissal'. The applicant in his submission before the Industrial Court made many references to allegation of breach of contract. He even relied on an authority for the 'constructive dismissal'. Thus, the issue of usage of the phrase 'constructive dismissal' in the said award raised by the applicant was devoid of any merit (see para 19).

(3) The Industrial Court had adequately dealt with the allegations raised by the applicant. These allegations turn upon a factual determination in

regard to a competing version of events advanced by the two parties. The court had no reason to interfere with the findings of the Industrial Court by way of judicial review (see para 25).

[**Bahasa Malaysia summary**

Pemohon telah diambil kerja oleh Berjaya Georgetown Hotel (Penang) Sdn Bhd sebagai Pengurus Pembelian. Surat pelantikan menyatakan terma-terma dan syarat-syarat pekerjaan termasuk peruntukan-peruntukan berkenaan dengan pindahan. Pemohon telah dipindahkan ke responden kedua sebagai penolong pengurus pembelian. Ini adalah satu permohonan oleh pemohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Dalam award itu, Mahkamah Perushaan telah menolak tuntutan pemohon bahawa beliau telah dipecat tanpa sebab yang munasabah. Mahkamah Perusahaan mendapati bahawa pemohon telah secara sukarela meninggalkan pekerjaannya dengan responden kedua.

Diputuskan, menolak permohonan untuk semakan kehakiman:

(1) Mahkamah Perusahaan betul dalam meletak beban membukti seperti mana yang telah dilakukan, iaitu atas pemohon. Ini adalah konsisten dengan kes *Weltex Knitwear Industries Sdn Bhd v Lau Kar Toy & Anor* [1998] 7 MLJ 359 (lihat perenggan 16). Fakta pemecatan telah dipertikaikan dan apabila fakta pemecatan dipertikaikan, pemohon mempunyai beban untuk membuktikan bahawa fakta adalah bahawa sememangnya terdapat pemecatan seperti yang dinyatakan. Mahkamah Perusahaan mendapati bahawa pemohon tidak memuaskan beban membukti (lihat perenggan 17).

(2) Mahkamah Perusahaan betul dalam penggunaan frasa 'constructive dismissal' dalam award tersebut. Dalam situasi kes ini, Mahkamah Perusahaan mempunyai asas fakta yang mewarankan penggunaan frasa ini. Fakta-fakta dan hujah-hujah yang dinyatakan adalah konsisten dengan dakwaan 'constructive dismissal'. Pemohon dalam penghujahannya dihadapan Mahkamah Perusahaan telah membuat beberapa rujukan kepada dakwaan kemungkiran kontrak. Beliau juga telah bergantung pada satu autoriti untuk 'constructive dismissal'. Oleh itu, isu penggunaan frasa 'constructive dismissal' dalam award tersebut yang dibangkitkan oleh pemohon tidak mempunyai sebarang merit (lihat perenggan 19).

(3) Mahkamah Perusahaan telah dengan secukupnya menimbangkan dakwaan-dakwaan yang dibangkitkan oleh pemohon. Dakwaan-dakwaan ini telah menimbulkan satu keperluan untuk mempertimbangkan versi-versi yang bercanggah yang dinyatakan oleh kedua-dua pihak. Mahkamah tidak ada sebab untuk campur tangan dengan penemuan Mahkamah Perusahaan melalui semakan kehakiman (lihat perenggan 25).]

Notes

For cases on awards from the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

Cases referred to

Weltex Knitwear Industries Sdn Bhd v Lau Kar Toy & Anor [1998] 7 MLJ 359 (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 CCT 235 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

YT Ling (Lee, Ling &Partners) for the applicant.
S Rutheran (R Sivagnanam & Associates) for the respondent.

Raus Sharif J:

[1] This is an application by Ling Ngong Tick ('the applicant') for an order of certiorari to quash the Industrial Court Award No 657 dated 29 November 2000. In the said award, the Industrial Court dismissed the applicant's claim that he had been dismissed without just cause or excuse. The Industrial Court found that the applicant had voluntarily left the service of the second respondent.

[2] The facts leading to this application are these. The applicant was employed by Berjaya Georgetown Hotel (Penang) Sdn Bhd ('Berjaya Hotel Penang') as a Purchasing Manager on 5 April 1995. The letter of appointment dated 5 April 1995 set out the terms and conditions of his employment which include provisions relating to transfer. Clause 19 of the terms and conditions of employment provided:

> Every employee is subject to transfer and/or relocated from one department to another within the company or from the company to its Holding Company (including intermediate and ultimate) or its Holding Company's subsidiary or associated company.
>
> Transfer of employees shall be the sole prerogative of the company and shall not be disputed.

[3] The applicant was confirmed in employment as Purchasing Manager on 21 November 1995. Upon confirmation, the Berjaya Hotel Penang made it known to the applicant that:

> Your appointment is subject to you continued compliance with any conditions of service or Company's rules and practices either express or implied for the time being in force.

[4] By a letter dated 27 August 1996 the Berjaya Hotel Penang notified the applicant that he will be relocated to the Central Purchasing Department in Kuala Lumpur with effect from 16 September 1996. He was further informed that his terms and conditions of employment would remain unchanged.

[5] The applicant by a letter dated 13 September 1996, ie three days before his intended relocation, appealed against the relocation. He contended that:

(i) he had been given short notice;

(ii) he sought relocation allowances;

(iii) although he was to continue in the purchasing function, he nevertheless requested to know his job functions; and

(iv) that his salary must commensurate with that of a Manager in the Kuala Lumpur office.

[6] Nevertheless the applicant proceeded to relocate himself to Kuala Lumpur office on 16 September 1996, whilst his appeal was still pending.

[7] At the point of relocation, the applicant was still an employee of Berjaya Hotel Penang. By a letter dated 14 October 1996, Berjaya Hotel, Penang informed the applicant that his employment would be transferred to Berjaya Leisure Bhd ('Berjaya Leisure') and that he would cease to be an employee of Berjaya Hotel Penang effected from 16 October 1996. The applicant was also informed that his past services would be recognised in full by Berjaya Leisure.

[8] By a letter dated 15 October 1996, Berjaya Leisure confirmed the applicant's transfer to and absorbed into the service of Berjaya Leisure with effect from 16 October 1996, as Assistance Purchasing Manager, C1 Grade. The applicant accepted the offer but made the following deletions on the said letter, namely:

(i) The effective date of transfer which stated as 16 October 1996;

(ii) The applicant's grade as C1 grade; and

(iii) The revised terms and conditions which contained a probation clause.

[9] In addition, the applicant by his letter dated 29 October 1996 express his unhappiness of his redesignation from Purchasing Manager, Grade BB on his first appointment in Penang, to being Assistant Purchasing Manager in C1 Grade in Kuala Lumpur.

[10] Berjaya Leisure by a letter dated 9 November 1996, responded:

(i) Agreeing to backdate the applicant's transfer to 16 September 1996 together with his adjusted salary of RM3200;

(ii) Removing the probation clause in the revised terms and conditions of employment; and

(iii) Advising the applicant that the grading structure at the Head Office differ from Berjaya Penang Hotel and there was no basis for comparing the position and ranking. As such the applicant to remain as Assistant Purchasing Manager on C1 Grade.

[11] The applicant did not acknowledge acceptance of his grading as Assistant Purchasing Manager Grade C1 in the head office but continued to serve in that position with the increased salary.

[12] Effective from 20 May 1997 Berjaya Leisure had its name changed to Berjaya Land Bhd ('Berjaya Land'). By a letter dated 14 November 1997, Berjaya Land issued a notice to the applicant that he be transferred to Berjaya Redang Beach Resort Sdn Bhd ('Berjaya Redang') in Terengganu with effected from 17 November 1997 and that his employment with the Berjaya Land ceased on 17 November 1997. By a letter on the same date, Berjaya Redang gave a letter of appointment to the applicant.

[13] The applicant refused to accept the transfer and cessation of employment and gave his reasons in a letter to Berjaya Land dated 17 November 1997. The applicant in gist stated that the second respondent purported transfer was in bad faith, arbitrary, capricious and is in breach of contract.

[14] By a letter dated 17 November 1997, Berjaya Land gave another notice to the applicant to report to work at Berjaya Redang on 19 November 1997 and to leave his office by 5pm on the same day. By a letter dated 18 November 1997, the applicant informed the second respondent's action amount to summary dismissal and that he had considered himself summarily dismissed by the second respondent with immediate effect.

[15] On the above facts the Industrial Court made the following findings:

(i) The burden is on the applicant to satisfy the court that the employer had embarked upon a cause of action or series of actions taken separately or cumulatively were calculated to drive him of employment and the applicant had not discharged the said burden;

(ii) The allegation of demotion was not conclusively proved by the applicant;

(iii) The transfer of the applicant from Berjaya Land to Berjaya Redang was within the transfer clause in the term and conditions of applicant's contract of service;

(iv) No evidence of *mala fide* on the part of Berjaya Land for the sudden transfer of the applicant; and

(v) The applicant voluntarily left the second respondent and this constitutes the just cause for his dismissal.

[16] Before me, the first issue raised by the applicant was that the Industrial Court had misdirected itself on the burden of proof. With respect, I am unable to agree. To me, the Industrial Court was correct in assigning the burden of proof in the manner with which it had done ie on the applicant. This position is consistent with what was said by Abdul Kadir Sulaiman J (as he then was) in *Weltex Knitwear Industries Sdn Bhd v Lau Kar Toy & Anor* [1998] 7 MLJ 359 which reads:

Next in the burden of proof issue of forced resignation raised by the first respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissed was done with just cause and excuse. This is because by the 1997 Act, all dismissal is *prima facie* done without just cause and excuse. Therefore, if an employee assets otherwise, the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by the employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause and excuse would not at all arise (see *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1998] 1 MLJ 92). In the present case, it is the first respondent who asserts that she was dismissed and the applicant design it. So, it is for the respondent to establish so by the evidence.

[17] Similarly in the present case, that it was the applicant who asserted that he had been summarily dismissed. But was denied by Berjaya Land. Thus, the fact of dismissal was in dispute and when the fact of dismissal is in dispute, the applicant bears the burden of proving that there was in fact such a dismissal. If he cannot do so then his case fail. The Industrial Court found that the applicant had not discharged the burden and I have no reason to disagree.

[18] The next issue raised was on the phrase 'constructive dismissal' used by the Industrial Court at the opening statement of the award. According to the applicant, the applicant in his pleading never claimed constructive dismissal. While, this may be true but looking at the complaint by applicant the Industrial Court had a factual basis or reason which warranted the use of the phrase constructive dismissal. To understand for the usage of the phrase constructive dismissal by the learned chairman, it is necessary to look at the complaints by the applicant. The complaints by the applicant may be summarised as follows:

(i) It is not proven that Berjaya Land is owned by Berjaya Group Bhd and that the transfer to any other company of Berjaya Group Bhd is law and in breach of contract;

(ii) If the applicant accepts the transfer, his contract of employment with Berjaya Land had been terminated on or before 17 November 1997 then a fact of termination has occurred;

(iii) Berjaya Land did not pay the applicant one month's salary in lieu of notice and had not given notice of termination before the transfer;

(iv) The transfer is in breach of those terms and laws is bad in law and unconstitutional because the applicant was punished by Berjaya Land when his wage in the form of annual leave were forfeited;

(v) The transfer to Berjaya Redang as Assistant Manager — Grade C1 upon the same terms and conditions in a breach of contract in that it was to a position of lesser responsibility and corresponding demolition on rank and file;

(vi) Berjaya Land clearly evinced an intention to no longer be bond by the contract of employment when it demanded the applicant to return document and leave office by 5pm on 17November 1997;

(vii) Berjaya Land had breached the rules of natural justice by not giving the applicant the chance to be heard before the transfer; and

(viii) The applicant was forcibly removed from the premise of Berjaya Land by the security personnel Berjaya land.

[19] Looking at the list of complaints presented by the applicant to the Industrial Court, I am of the view the Industrial Court was entirely correct in its use of the phrase constructive dismissal. In the circumstance of this case, the Industrial Court had a factual basis or reason which warranted the use of the phrase. No doubt the pleading did not use the phrase constructive dismissal, but the facts and argument presented are consistent to an allegation of constructive dismissal. The applicant in his submission before the Industrial Court made many references to allegation of breach of contract. He even relied on the authority for the constructive dismissal, namely the Supreme Court's decision in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92. Thus, the issue of usage of the phrases constructive dismissal raised by the applicant is devoid of any merit.

[20] In this case, the applicant alleged that he has been summarily dismissed. The second respondent denied the allegation. Both sides presented competing evidence as to whether what transpired was indeed a case of summary dismissal. The Industrial Court investigated and analysed the evidence and concluded that the applicant had not discharge his burden. Looking at the applicant's submission, it is nothing more than an attempt to present his analysis of the evidence and to argue that the Industrial Court should have made a finding in his favor. This is not permissible in a judicial review. In *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CCT 235, the Federal Court held as follows on a question of findings of fact:

> It is well settled that a court cannot utilise certiorari proceeding as a cloak to entertain what, in truth, is an appeal against findings of fact.

[21] In the present case, looking at the award as a whole, I am of the view the Industrial Court has adequately dealt with the allegations raised by the applicant. On the issue of downgrading and demotion the Industrial Court held as follows:

The claimant was Purchasing Manager Grade BB when he was first appointed in Penang, but his starting salary was then RM2300. In Kuala Lumpur for whatever the reason, or even for reasons of increased cost of living, the claimant definitely had a pay-rise to RM3200. The designation in the job title as he perceived it was 'downgraded' because he was now the Assistant Purchasing Manager. Now, the court will say that is illusory. In corporate hierarchy, it goes without saying that those in the higher management, the top executives are based or located in the Head Office from where all the branches take instructions. The Penang location was on the lower hierarchy, and even being labeled 'Purchasing Manager' the salary of RM2300 will denote that it is lower then if he is in the central corporate office irrespective of the nomenclature. It has to be construed in the claimant's case that as an Assistant Purchasing Manager at the head office he is higher than a Manager at the Penang Branch. The salary factor is tied to the grading, not to the nomenclature or title description. But why the designation was changed to an 'Assistant' in his KL location can be due to many or several reasons of the company. For example, there may have already been someone holding the post of the full Purchase Manager, under the General Manager of division, or the General Manager himself holding or acting in the post making the claimant 'Assistant' to him (see explanation of COW — 2).

To put it another way, if an Assistant Manager at head office is accorded a higher pay compared to a full Manager with lesser pay at the Branches, does it constitute a demotion? Save for the terminologies, the court views that it is still a promotion from the branch to the HQ especially in view of the payrise. In any event, the company confirmed that he was going as a full Purchasing Manager at Pulau Redang — CO–11.

[22] With regard to the sudden nature of the transfer of the applicant the Industrial Court said as follows:

The claimant was questioning about the sudden transfer and imputed that it was not done bona fide. The court will accept the explanations of the Vice-President Operations for the Group of Berjaya Hotels portfolio (COW–1) and the Group General Manager of the Group Personnel and Administration of the Company, (COW–2), that the previous Purchasing Manager of the Redang Beach had resigned sometime in 1997, and the company failed to get a suitable candidate to fill the post despite several media advertisement. Because of the urgency of the situation they had asked the claimant to go.

The normal consideration for transferring employees by their employers are conditioned by factors like exigency of service to fulfill the requirements of the company. Any feeling of unfairness or discomforts experienced by employees in the course of a transfer is subordinated to that contingency. If the *bona fides* of the employers are proved, then the court will not interfere with the rights of the company to effect transfer to fulfill their requirements.

The court finds no evidence of *mala fide* on the part of the company on their reasons for the sudden nature of the transfer the claimant was complaining about.

[23] On the same issue of transfer of the applicant, the Industrial Court stated:

> The court is inclined to believe that the company was already beginning to be aware from the 17 November itself that the claimant was resisting the transfer order by finding excuses, and so had given the deadline to leave the office: 5pm 17November 1997. It was perfectly entitled to do that. And that was precisely the reason the security was sent to retrieve company documents and properties, which were confidential, since there were signs of resistance or defiance to hand over the company properties.
>
> The question is, if one day (18 November) is considered traveling day to reach destination at 9am 19 November, why did the claimant adamantly make appearance in the KL office at 9am on 18 November unless what he told the Security Manager must be true that he was decidedly not leaving the office.
>
> Again, on the question of his 14 days leave entitlement which he alleged the company prevented him from taking, the court do recognise that in certain situations there are equal and competing rights on both sides of the employer/employee equation. In such a situation, the court will usually quantify by who has got the prior rights? Leave entitlement must be subject to approval by the employer to schedule staff's leave having regard foremost to company's production process and/or obligations to third parties or the customers.
>
> The company's prerogative on incidental matters or directives in the major transfer order, will have precedence, and employees are bound to obey legitimate orders and instructions of the company. Failure to comply on the worker's part will constitute misconducts of insubordination, and failing which they are liable to dismissal. In any event, there is no evidence that he had applied for his leave entitlement, as his reason for deferment of the transfer. It will be pure speculation if the company will or will not have granted him the leave — the Company may well have.

[24] In conclusion the Industrial Court held that:

> In good conscience and equity and weighing the evidence on its substantial merits, the claimant has failed to satisfy the court that the company had in any way repudiated any of the terms of his contract of employment or had committed any breach which entitled him to leave the cmpany.
>
> It was the claimant's own doings that he had misconstrued a demotion to his post as a reason for not obeying the lawful instructions of his employer on the transfer orders, and for wrongly advancing other grounds based on unreasonableness as an excuse to resist the transfer, by abandoning his work in that unreasonable manner.
>
> His voluntary leaving the cmpany constituted the just cause for his dismissal, for having failed on the burden placed upon him to discharge based on the appropriate test.

[25] To me, the Industrial Court has adequately dealt with the allegations raised by the applicant. These allegations turn upon a factual determination in regard to a competing version of events advanced by the two parties. This

curt has no reason to interfere with the findings of the Industrial Court by way of judicial review. I am unable to say that the findings of the Industrial Court was based on no evidence or findings that were so unreasonable that no reasonable person similarly circumstanced could have arrived at such findings.

[26] It is for the above said reasons the applicant's application for judicial review was dismissed with costs.

Application for judicial review dismissed with costs.

Reported by Peter Ling